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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 661

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. VI, 611–628) is reported in 114 F. (2d) 905. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. V, 283–359) are reported in 14 N. L. R. B. 346.

JURISDICTION

The decree of the court below (R. VI, 629) was entered on October 8, 1940.[1] A petition for re-

[1] A supplemental decree (R. VI, 648) was entered on December 5, 1940, amending the prior decree in conformity

hearing filed by petitioner (R. VI, 630–647) was denied on December 2, 1940 (R. VI, 648). The petition for a writ of certiorari was filed on December 31, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether petitioner's discriminatory discharges were unfair labor practices.

2. Whether the Board's order should be denied enforcement because of its alleged failure to consider, in the absence of evidence, petitioner's asserted apprehensions concerning sit-down strikes.

3. Whether the Board made sufficient findings of fact to support its ultimate findings and conclusions that petitioner was responsible for assaults by its employees upon persons seeking to distribute union leaflets.

4. Whether petitioner was denied a fair hearing by reason of the conduct of the trial examiner who presided at the taking of the evidence.

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with the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, No. 14, this Term, decided November 12, 1940, by striking from the Board's order the provision for reimbursement of governmental relief agencies; enforcement of this provision had been stayed by the prior decree pending decision in the *Republic Steel* case (R. VI, 629).

5. Whether the court below should have permitted petitioner to inquire into the Board's processes of decision.

6. Whether the Board's findings and order are invalid by reason of the fact that the record does not recite that they were made at a meeting of the Board.

7. Whether the Board prejudged the case and was biased against petitioner.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

On December 22, 1937, the Board issued its original decision and order against petitioner (R. III, 2094–2161) upon proceedings which included charges filed by the International Union, United Automobile Workers (a labor organization referred to herein as the U. A. W.), and by certain individuals (R. I, 5, 7, 8, 9, 10, 35, 37), a complaint alleging that petitioner had engaged in specified unfair labor practices at its River Rouge and Highland Park plants (R. I, 11–18), an answer by petitioner (R. I, 26–32), a hearing before a trial examiner (R. I, 33, *et seq.*), and transfer and continuation of the proceedings before the Board (R. III, 2093).

On January 23, 1939, the Board, with leave of the Circuit Court of Appeals, set aside its original findings and order for the purpose of reconsidering the entire case (R. V, 4–5). See *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364. On January 26, 1939, the Board issued proposed findings of fact, proposed conclusions of law, and a proposed order (R. V, 6–79) and provided that the parties should have the right to file exceptions and briefs and to request oral argument before the Board (R. V, 6). On February 6, 1939, the Board denied a motion by petitioner to suppress the evidence taken before the trial examiner and to set aside the hearing (R. V, 79–82, 84), and on March 31, 1939, denied a further motion by petitioner to adduce additional evidence (R. V, 140–269). Petitioner duly filed with the Board exceptions to the proposed findings of fact, conclusions of law, and order, together with a motion to dismiss the complaint on the grounds stated in the exceptions (R. V, 86–139, 140); petitioner likewise filed a brief in support of its exceptions. On April 22, 1939, counsel for petitioner and for the U. A. W. participated in extended oral argument before the Board (R. V, 275–280). On May 18, 1939, the Board denied a motion by petitioner for leave to supplement the record as to the procedure of the Board and to except and argue to the record as so supplemented (R. V, 281–283). On August 9, 1939, the Board, having reconsidered the

entire case, denied petitioner's motion to dismiss the complaint and, upon the entire record in the case, stated its findings of fact and conclusions of law, and issued its final order against petitioner (R. V, 283–359).

The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

In the spring of 1937, when the U. A. W. commenced a drive to organize petitioner's employees, Henry Ford issued a series of statements to the press evincing open hostility to that union and to labor organizations in general (R. V, 291-293). Newspaper reports of interviews with Ford quoted him as saying, among other things, that "Labor union organizations are the worst thing that ever struck the earth * * *" and that petitioner would "never recognize the United Automobile Workers' Union or any other union" (R. V, 291). These and other similar statements by Ford were not denied and served as a significant background to the campaign of intimidation and coercion which petitioner launched against the U. A. W. (R. V, 293).

On May 26, 1937, a group of from 50 to 70 persons, at least two-thirds of whom were women, at-

[2] Jurisdictional facts are omitted since no question as to jurisdiction is raised. References to the evidence supporting the Board's findings also are omitted, there being no contention that any of the findings are not supported by substantial evidence.

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tempted to distribute U. A. W. leaflets near outer entrances to the River Rouge plant and at various other places in the vicinity (R. V, 293–309). The distribution, though lawful, was forcibly prevented by two supervisory employees and various other employees of petitioner, including a number of Ford Service Men, as the company guards were called (R. V, 295–309). Without provocation (R. V, 319) those persons brutally assaulted many of the union group and seized their leaflets; some indication of the nature of the assaults is afforded by the fact that the back of one union man was broken, and another suffered a fractured skull (R. V, 301, 305). The first persons attacked were Richard T. Frankensteen and Walter P. Reuther, who were the U. A. W. officers in charge of the organizational drive (R. V, 294–296). While in the act of quietly leaving the overpass at Gate 4 of the plant in obedience to a command to "get the hell off of" Ford property,[3] they were surrounded, knocked down, kicked and slugged, their assailants being led by a member of the Ford Service Department and by two of petitioner's foremen (R. V, 295–299, 314).[4] One of these foremen later dragged one of

[3] The Board deemed it doubtful, and found it unnecessary to decide, whether any trespass upon petitioner's property had been committed by any of the union group (R. V, 316–317). The Board stated that "Technical trespass has never been recognized in law as a justification for extreme brutality" (R. V, 316).

[4] The assaults upon Frankensteen and Reuther and upon several others are vividly portrayed in the photographs of

the U. A. W. men to the office of the Service Department at Gate 4 and there participated in beating him up in the presence of Everett Moore, head of the Service Department (R. V, 301). There were numerous savage assaults on others of the union group, accompanied by imprecations which left no doubt that the offense was union affiliation (R. V, 295–309).

The Board found that petitioner was responsible for the assaults (R. V, 309–315). They were not a spontaneous outbreak on the part of "loyal employees" (R. V, 318–319). For some time prior to May 26 petitioner had been aware that the U. A. W. intended to distribute leaflets and had maintained a large number of guards at the plant gates (R. V, 309). One of these testified that his instructions were that, if he caught anyone passing handbills, "beat him up and bring him to the service office" (*ibid.*). On May 26, before the U. A. W. men appeared, petitioner stationed a large force of men at Gate 4 (R. V, 313). It expected friction to develop and, through Moore, head of the Service Department, announced to newspapermen

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newspapermen who were present at the scene (Bd. Exhs. 31–67). These and other newspapermen were interfered with and some had their films and notes forcibly taken by petitioner's employees (R. I., 244, 246, 254, 259, 265–266, 296–297, 299, 460, 534–535). One newspaper photographer was pursued for several miles by three Ford Service Men until he reached a police station (R. V, 306–307).

that although it would take no action to prevent the distribution of leaflets, "maybe some loyal employees might resent" the distribution and, if they tried to prevent it, "it wouldn't be the fault of the Ford Motor Company" (*ibid.*). Some of the employees who participated in the assault were led by petitioner's supervisors and practically all of the leading participants were paid by petitioner for their time spent in administering the beatings (R. V, 315, 319). Moore was present at the scene of the violence and acquiesced in the assaults (R. V, 301, 315).

On May 27, 1937, petitioner was responsible for further assault against two members of the U. A. W. who were driving along the public highway wearing their union pins (R. V, 323). In April and May petitioner distributed antiunion literature to its employees in such manner and under such circumstances as to coerce them (R. V, 319–323). Subsequently, a "Vote of Confidence" in the policies of Henry Ford was circulated through the River Rouge plant (R. V, 324). In many cases employees were asked by their foreman to sign the Vote; those refusing to do so had their badge numbers noted down (*ibid.*). Petitioner then publicized the Vote as an endorsement of its labor policies and as a rejection of the U. A. W. (*ibid.*). On various dates between February 2, 1937, and June 29, 1937, petitioner discriminatorily discharged 22 employees and caused the resignations

of 2 other employees because of their membership or activity in, or sympathy for, the U. A. W. (R. V, 324–345).[5]

Upon the foregoing subsidiary findings, together with ultimate findings that by its acts and those for which it was responsible petitioner had interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 and had discouraged membership in the U. A. W. (R. V, 319, 323–324, 344–345), the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. V, 357). The Board ordered petitioner to cease and desist from its unfair practices; to reinstate with back pay the employees illegally discriminated against; and to post appropriate notices (R. V, 357–359). The allegations of the complaint which were found to be unsupported (note 5, below) were dismissed (R. V, 359).

On September 13, 1939, the Board filed in the court below a petition for enforcement of its order together with a certified transcript of the record of the proceedings had before the Board pursuant

[5] The Board found that petitioner had not violated the Act with respect to 11 other employees alleged to have been discriminated against illegally (R. V, 345–355, 357). The Board likewise found that the evidence was insufficient to support the allegation that petitioner had dominated and interfered with the Ford Brotherhood of America, Inc., in violation of Section 8 (2) of the Act (R. V, 324).

to the remand (R. VI, 365–372). Upon stipulation of the parties, the record of the proceedings before the Board filed in the court below prior to the remand was ordered to be deemed filed as part of the record in the instant case (R. VI, 372–373). Petitioner filed an answer to the Board's petition for enforcement and a cross-petition for review of the Board's order (R. VI, 373–401). In addition, petitioner filed a motion to compel the Board to reply to certain allegations, contained in the answer and cross-petition, with respect to the Board's processes of decision (R. VI, 401–402); a motion directing the Board to supplement the record with respect thereto (R. VI, 421–424); a petition for leave to adduce additional evidence before the Board (R. VI, 428–559); a petition for a commission to take depositions (R. VI, 601–609); and a motion to compel the Board to certify alleged additional parts of the record (R. VI, 561–601). The petition for a commission to take depositions was denied on February 15, 1940 (R. VI, 610–611).

On October 8, 1940, the court handed down its opinion (R. VI, 611–628) and entered a decree (R. VI, 619) denying the other petitions and motions of petitioner and enforcing the Board's order except for the provision requiring petitioner to cease and desist from interfering, restraining, and coercing its employees through the distribution of antiunion literature, the provision requir-

ing the reinstatement and reimbursement of Emil Tomkow, and the provision for reimbursement of Governmental relief agencies. These provisions were set aside, the last one by a supplemental decree (R. VI, 648) entered December 5, 1940, in conformity with the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* No. 14, this Term, decided November 12, 1940. A petition for rehearing (R. VI, 630–647) was denied on December 2, 1940 (R. VI, 648).

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT PETITIONER VIOLATED THE ACT

1. *The Discharges.*—Petitioner contends that the discriminatory discharges found by the Board did not constitute unfair labor practices because "an employer may discharge persons belonging to an organization which he has reason to fear will attempt to seize his plant by force and violence" (Pet. 4–6, 19–21). This question is not involved in the present case; it can be raised only upon the assumption, unwarranted by anything in the record, that at the time of all of the discharges petitioner either had reason to fear or did fear that the U. A. W. would attempt to seize its plant. There is no evidence to that effect. See *infra,* pp. 14–15. Nor is there any evidence, or any claim, that a

single one of the discharges was intended as a precautionary measure against the asserted threat of a sit-down strike. Indeed, the evidence introduced by petitioner was designed to prove a precisely contrary point, that the employees' union affiliation had nothing to do with their discharge.[6]

Petitioner does not assert that the evidence does not afford the requisite support for the Board's findings (R. V, 324 *et seq.*) that petitioner discharged the employees because of their membership in, or lawful activity on behalf of, or sympathy for, the U. A. W. It follows, quite evidently, that whatever grounds for discharge petitioner subsequently decides might have been applicable, the discharges were illegal and in violation of Section 8 (3) and (1) of the Act. Cf. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 330–333; *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941.

The decision below is not in conflict, as petitioner asserts (Pet. 21), with the decisions in *National La-*

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[6] Petitioner's testimony ascribed the discharges to inefficiency or other causes applicable equally to union and non-union employees. In several instances the foremen called by petitioner to explain the discharges testified, in response to questions asked by counsel for petitioner, that they did not know that the men they discharged were members of or were sympathetic to the U. A. W. (R. III, 1625, 1647–1648, 1796, 1812, 1848, 1861, 1879). Petitioner introduced no evidence whatever as to the discharges of Kuzulis, Sheldon, and Smick.

bor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5), certiorari denied, 305 U. S. 653. In those cases sit-down strikes had occurred and the employers contested the Board's findings as to the reasons for the discharges, successfully claiming that the evidence established that the unlawful activities of the employees in the *Fansteel* case and the apprehension of further such activities in the *Peninsular & Occidental* case were the motivating factors. There can be no analogous claim in the present case.

2. *The Supposed Failure of the Board to Consider Sit-Down Strikes.*—Petitioner contends (Pet. 6-7, 21-23) that the Circuit Court of Appeals should have set the Board's order aside because the Board failed to consider facts and circumstances material to the issues presented, namely, sit-down strikes in the automobile industry and the supposed threat by the U. A. W. to seize petitioner's plant.

(a) The alleged threat to seize petitioner's plant, which seems to be the chief circumstance which the Board is claimed to have disregarded, is based simply upon surmise; no such evidence was introduced or offered by petitioner at the hearing. The claim (Pet. 6) that petitioner offered such evidence but that the trial examiner excluded it, is not supported by the references given (R. I,

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134–136, 600–601; V, 286) or by any other portion of the record.[7]

Indeed, the record affirmatively indicates that after the decisions of this Court on April 12, 1937, upholding the Act—subsequent to which all of the unfair labor practices occurred except three of the discharges—there was neither any threat of a sit-down strike nor any *bona fide* apprehension by petitioner that such a strike might occur. On the day following the decisions of this Court the national president of the U. A. W. publicly announced that a "strike to force Henry Ford to recognize the Union will not be necessary now" (Bd. Exhs. 112, 114, 115). On the same date Henry Ford stated, in effect, that he did not believe that there was likely to be "trouble of any kind" (Bd. Exhs. 112, 114, 115. See also R. III,

[7] Indeed, petitioner's counsel objected to the introduction of proof as to the dates of the General Motors and Chrysler strikes, and as to whether the U. A. W. was known to have called the strikes, on the ground that "it is all incompetent, irrelevant, and immaterial" (R. II, 1293; III, 1700–1701). The "offers of proof" relied upon by petitioner (Pet. 6) were contained in a motion to reopen the record made subsequent to the hearing and after the Board's original decision and order (R. V, 140). Since there were no reasonable grounds for petitioner's failure to have introduced or offered such proof at the hearing, and since the proof offered was immaterial, the Board properly denied the motion (R. V, 269). The court below likewise properly denied petitioner's similar petition for leave to adduce additional evidence (R. VI, 428).

1679–1680).[8] In the absence of any evidence inconsistent with these statements, it is doubtful whether judicial notice could be taken of anything beyond what the court below termed the "industrial phenomenon" of sit-down strikes (R. VI, 618), a phenomenon without particular relevance to petitioner's plant.[9] *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 301; *Osborne* v. *Gray*, 241 U. S. 16, 21.

(*b*) Even if it were assumed that the circumstances which petitioner claims the Board failed

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[8] The exhibits cited are accounts in three newspapers of an interview between Henry Ford and representatives of the Associated Press. The reports state, *inter alia:*

"Asked what the Ford Company would do in the event of a strike at the Rouge plant, Mr. Ford said:

"'We don't anticipate trouble of any kind, and we are not prepared to say what we would do.'"

[9] While there is evidence indicating that petitioner took certain precautions during the General Motors and Chrysler strikes, such evidence plainly would not have warranted a finding that petitioner's plants were either threatened or believed to be threatened at the subsequent time when the principal unfair labor practices were committed by petitioner (See R. I, 617, 671, 696, 713, 728; II, 938). The General Motors and Chrysler strikes occurred from December 30, 1936, to February 11, 1937, and from March 8, 1937, to April 6, 1937, respectively (R. II, 1293). Contrary to its action in its original and proposed decisions (R. III, 2156–2157, 2159; V, 73–74, 77), the Board in its final decision did not find that petitioner's "precautionary measures" constituted unfair labor practices. This may well indicate that the Board did consider the matters which petitioner complains it disregarded.

to consider had been available for consideration, the asserted failure would not warrant setting aside the order. The supposed threat of a sit-down strike and the other circumstances relied upon had no material bearing upon any of the issues which the Board decided against petitioner. As the Circuit Court of Appeals appears to have held (R. VI, 618–621), those circumstances could not justify, or absolve petitioner from responsibility for the assaults, the circulation of the "Vote of Confidence," or the discriminatory discharges. *Supra,* pp. 5–9. Petitioner does not assert the contrary and does not attempt to specify a single finding which should be changed if the case were remanded to the Board for further consideration in the light of its supposed fear of sit-down strikes. A remand, therefore, would be idle. Cf. *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, 359; *Hathaway* v. *Cambridge National Bank,* 134 U. S. 494, 499; *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 473; *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 659 (C. C. A. 9).

3. *The Findings as to Petitioner's Responsibility for the Assaults of May 26.*—Petitioner contends (Pet. 8–9, 22–23) that the court below erred in sustaining the Board's findings and conclusions that petitioner was responsible for the assaults of May 26, 1937, and that it thereby interfered with, restrained, and coerced its employees in violation

of the Act (R. V, 309, 315, 319). The grounds of this contention are that the Board "did not reveal the theory on which it reached such conclusions, and it made no findings of ultimate fact from which such conclusions would follow under the theory of *respondeat superior*" or any other theory (Pet. 9). Even were this point well taken, which it is not, it would afford no occasion for granting the writ since the evidence and findings as to the assaults on the following day and as to the other unfair labor practices (*supra,* pp. 8–9) are ample to support the order.

The Board's extensive and detailed findings concerning the circumstances surrounding the assaults on May 26 are clearly sufficient to support the conclusion that those assaults constituted interference and coercion "for which the employer may fairly be said to be responsible." *International Association of Machinists* v. *National Labor Relations Board,* No. 16, this Term, decided November 12, 1940; *H. J. Heinz Co.* v. *National Labor Relations Board,* No. 73, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941. While it would in any event be immaterial that the Board did not state the theory upon which it reached its ultimate findings and conclusions (*Helvering* v. *Gowan,* 302 U. S. 238, 245–246; *Helvering* v. *Rankin,* 295 U. S. 123, 132–133), the organized and brutal assaults by petitioner's Service Men,

and together with the announcement of the head of the Service Department (*supra*, pp. 6–8) ~~foreman~~, makes petitioner's responsibility self-evident.

The implied claim that petitioner was not in fact responsible for the assaults is wholly inconsistent with the position taken by petitioner in its answer to the complaint and at the hearing. There petitioner did not claim or seek to prove absence of responsibility but, on the contrary, alleged that the assaults constituted lawful resistance by it to trespass and were committed by it in self-defense (R. I, 27–28; see also R. I, 136, 140, 141–145, 171–172; II, 1390–1419, 1439–1440, 1502–1505; III, 1978–1985).

II

THERE WAS NO PROCEDURAL DEFECT OR IRREGULARITY

1. *The Conduct of the Trial Examiner.*—Petitioner contends (Pet. 9–11, 23–24) that it was denied a full and fair hearing by reason of alleged misconduct by the trial examiner and that the decision of the court below in failing to set aside the Board's order on such ground is in conflict with the decisions of the Circuit Court of Appeals for the Seventh and Eighth Circuits in *Inland Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 9, and *Montgomery Ward & Co.* v. *National Labor Relations Board,* 103 F. (2d) 147, respectively. Similar contentions were made in the petition for certiorari in *Stackpole Carbon Co.* v. *National Labor Relations Board,* certiorari denied, 308 U. S. 605.

Petitioner cites, without discussion, a number of record references which are said to establish the impropriety of the trial examiner's conduct (Pet. 9–10). But those references afford no basis for attacking the holding of the court below that, while the examiner's conduct was "injudicious" at times, "material prejudice to the interest of the complaining litigant must clearly appear" and that "the prejudice urged * * * appears to rest upon pure speculation" (R. VI, 615–616).[10]

The record as a whole shows that the examiner accorded petitioner full opportunity to introduce evidence, cross-examine witnesses called by the Board, and otherwise meet the complaint and evidence against it.[11] Only once throughout the entire

[10] Compare *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 175; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Subin* v. *National Labor Relations Board*, 112 F. (2d) 326 (C. C. A. 3), certiorari denied, No. 280, this Term, October 14, 1940; *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, decided January 4, 1941 (C. C. A. 5); *Cupples Co. Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100, 113 (C. C. A. 8); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576.

[11] See *e. g.*, R. I, 125–148, 171–173, 444, 606–609, 621–624; II, 1332–1340, 1532–1535; III, 1629–1630, 1642–1644, 1718–1719, 1750, 1814–1816, 1877–1879, 1895–1900, 1953–1954, 1967–1969, 1980, 2081, 2089–2091. The Board's attorney made few objections to petitioner's introduction of evidence; when these objections appeared to the examiner to be unsound, they were overruled by him (R. I, 681; II, 1393, 1417; III, 1628).

hearing did petitioner find occasion to make an offer of proof; that offer related to the location of property lines, was immaterial to the issues, and was not renewed in petitioner's subsequent motion to reopen the record and petitions to adduce additional evidence (R. II, 1469–1470). Although represented by experienced counsel, petitioner at no time during the hearing, by objection, motion, or otherwise, made the claim urged here and in the court below, that the examiner's conduct "was plainly such as to induce Board witnesses to exaggerate and embroider their testimony, to intimidate witnesses called by petitioner * * *, and to hinder and discourage petitioner's counsel in the presentation of petitioner's case" (Pet. 10). Not until after the issuance of the Board's original decision and order and the appearance of appellate counsel who had not been present at the hearing (see R. I, 42), was this claim advanced, seemingly as an afterthought, and not until then did petitioner move to suppress the evidence or seek a rehearing (R. V, 79). Accordingly, it will not now be heard to urge that the hearing was unfair. *Drumm-Flato Commission* v. *Edmisson,* 208 U. S. 534, 540; *United States* v. *Atkinson,* 297 U. S. 157; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239. *Cf.* Rules and Regulations of the National Labor Relations Board, Series 1, as amended, Art. II, Sec. 28, quoted in the Appendix, p. 30.

The decision of the court below is not in conflict with the *Inland Steel* or *Montgomery Ward* decisions, as petitioner claims (Pet. 23). Each case "necessarily turns on its own facts." *United States* v. *Socony-Vacuum Oil Co., supra,* at 240. In the *Inland Steel* and *Montgomery Ward* cases, the conduct of the examiners which was held to have rendered the hearings unfair included, *inter alia,* over timely objections, the causing of improper omissions from the record (109 F. (2d) 13–14; 103 F. (2d) 149–150), excessively long examination of witnesses (109 F. (2d) 15, 18; 103 F. (2d) 155, 156), and unfair restriction of the employers' attorneys in their examination of witnesses (109 F. (2d) 18; 103 F. (2d) 151–156). No such circumstances are present in the instant case. Cf. *Cupples Co. Manufacturers* v. *National Labor Relations Board,* 106 F. (2d) 100, 113 (C. C. A. 8). Petitioner's further assertion (Pet. 23) that the decision of the court below is in probable conflict with certain decisions of this Court [12] is plainly unsound, especially since the examiner in the present case made no intermediate report or recommendation to the Board and did not participate in its decision (R. VI, 609, 610).

[12] *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304–305; *Tumey* v. *Ohio,* 273 U. S. 510, 522; and *Jordan* v. *Massachusetts,* 225 U. S. 167, 176. These cases involved, respectively, a commission's use of matters outside the record, a judge's pecuniary interest, and a juror's mental competency.

2. *The Board's Processes of Decision.*—Petitioner contends (Pet. 11–14, 25–27) that the Circuit Court of Appeals erred in denying various motions and a petition made by petitioner,[13] that these denials "prevented petitioner from obtaining a trial upon the justiciable issue presented by allegations already declared by this Court to afford, if true, a sufficient ground for setting aside the Board's order" (Pet. 14), and that the rulings are in probable conflict with the decisions in *Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1, and *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364.

As appears from their face, the motions and petition were filed in the hope of unearthing something in the Board's processes of decision to support petitioner's allegations that it had been denied a full and fair hearing in that, *inter alia,* the members of the Board, in considering the evidence and deciding the issues, had relied too extensively upon subordinates, had given weight to matters not in evidence, and were biased against employers in

[13] The motions were for the issuance of orders (1) compelling the Board to reply to allegations made by petitioner in its answer to the petition for enforcement and its cross-petition for review (R. VI, 401–402); (2) directing the Board to supplement the record (R. VI, 422–424); and (3) directing the Board to file alleged additional parts of the record (R. VI, 562–566). The petition was for a commission to take the depositions of two of the members of the Board and of 13 present or former employees of the Board (R. VI, 604–608).

general and against petitioner in particular (R. VI, 378–387).

The motions and petition were not filed pursuant to any provision of the Act. Moreover, they were not supported by any showing, much less a *prima facie* one, that the allegations, which were made upon information and belief, had any basis in fact.[14] In the absence of such a showing and in view of the presumption of official regularity and of the full proceedings shown by the record, including the oral argument before the members of the Board (R. V, 275, 287), it would have been "wholly improper" for the court below to have granted the motions or petition. *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 593; *De Cambra* v. *Rogers,* 189 U. S. 119, 122; *Clark* v. *United States,* 289 U. S. 1, 14, 18; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 145; *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 477–478.[15]

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[14] Petitioner contends (Pet. 13–14, 26) that its allegations were supported by the affidavit of one of its attorneys (R. VI, 567–601). Insofar as the quotations and other matters set forth in the affidavit may be said to be relevant at all, they indicate merely that, in general practice, the members of the Board in analyzing the evidence and embodying their decisions in written form are assisted by subordinates, comparable to judges' law clerks, who do not partcipate in the Board's prosecuting functions. Such assistance is both necessary and proper. *Morgan* v. *United States,* 298 U. S. 468, 481, and cases cited, *infra,* pp. 24–25.

[15] In the *Federal Communications Commission* case the Court sustained a ruling of the Court of Appeals for the Dis-

The action of the Circuit Court of Appeals in denying the motions and petition is in accord with its action prior to the remand in sustaining the Board's objections to interrogatories and in denying a petition for a commission to take depositions. 99 F (2d) 1003. It accords also with that court's denial of a motion to require answers to interrogatories propounded by the employer in *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, certiorari denied, 308 U. S. 568,[16] and with the decisions of five other Circuit Courts of Appeals and of the Court of Appeals for the District of Columbia denying various other attempts to support allegations similar to those herein.[17]

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trict of Columbia (106 F. (2d) 321, 326–327) denying a motion for a diminution of the record filed in an attempt to prove that the Commission allegedly had used as evidence certain data and reports which had not been introduced at the hearing and which the respondent had not had an opportunity to examine. The Commission's denial that it had considered the data or reports as evidence may be compared with the statements contained in the Board's signed decision herein that it had considered petitioner's exceptions and brief and that it made its rulings and order "*upon the entire record in the case*" (R. V, 288).

[16] The petition for certiorari in the *Louisville Refining* case urged, as one of its two main contentions, that the court had erred in denying the motion for answers to interrogatories.

[17] *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263 (C. C. A. 3); *National Labor Relations Board* v. *Lane Cotton Mills Co.*, 108 F. (2d) 568 (C. C. A. 5); *Inland Steel Co.* v. *National Labor Relations Board*, 105 F. (2d) 246 (C. C. A. 7); *Cupples Co. Manufacturers* v.

The Circuit Court of Appeals' denials of petitioner's motions and petition are not in conflict with the *Morgan* or *Ford* decisions, *supra*. The *Morgan* case, in sharp contrast to the situation herein, involved allegations of insufficient hearing which were supported by a showing on the face of the record that there had been no complaint or other document advising the company of the Government's claim against it; no proposed findings, conclusions, or order to which exceptions could be filed or argued; and no oral argument before the official who issued the order (298 U. S. at 474–477; 304 U. S. at 17–19). The Court, in its second decision declared that "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required" and assumed that the Secretary understood the evidence (304 U. S. at 18). It held the order invalid because "Those who are brought into contest with the Government in a quasi judicial proceeding * * * are entitled to be fairly advised of what the Government proposes

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National Labor Relations Board, 103 F. (2d) 953 (C. C. A. 8); *Donnelly Garment Co.* v. *National Labor Relations Board*, motion decided November 7, 1940 (C. C. A. 8); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 16 (C. C. A. 9); *Bethlehem Steel Co.* v. *National Labor Relations Board*, motion decided October 7, 1940 (App. D. C.); *Southern Garment Manufacturers Association, Inc.* v. *Philip B. Fleming*, petition to take testimony and Supplement record denied November 29, 1940 (App. D. C.)

and to be heard upon its proposals before it issues its final command" (304 U. S. at 18–19).

The *Ford* case presented no issue concerning the propriety of an inquiry behind the record into the Board's processes of decision, and the Court did not suggest that such an inquiry would be proper. In commenting that the alleged failure of the Board to consider the evidence and reach its own decision constituted a ground "sufficient for setting aside the order," the Court assumed the truth of the allegations merely for purposes of illustrating the propriety of the Circuit Court of Appeals' action in granting the Board's motion to remand (305 U. S. 364, 372).

3. *The Absence of a Recital of a "Meeting."*— Petitioner urges (Pet. 14–16, 27–28) that in failing to set aside the Board's order on the ground that the record does not recite that the decision and order were considered and made at a meeting of the Board, the Circuit Court of Appeals decided "an important question of Federal law" which warrants review by this Court.

The entire argument is based on an assumption, from the fact that the contrary is not recited, that the Board's decision and order were not made at a meeting of the Board.[18] But the mere absence of

[18] The assumption is not spelled out, but upon the basis of the absence of a formal recitation, petitioner states that "it appeared from the record that * * * the purported findings and order of the Board * * * were never considered and adopted by the Board as a board" (Pet. 14).

a formal recitation such as prefaced some of the Board's interlocutory orders in this case (Pet. 15n) does not warrant this assumption. Contrary to petitioner's assertions (Pet. 15, 28), other orders, issued at various stages of the proceeding, did not recite that they had been made at Board meetings (R. V, 7–79, 85, 275, 276–277, 279–280; see also, R. I, 32–33; III, 2094–2161, 2172). Although these included the Board's proposed findings, conclusions, and order (R. V, 7–79), petitioner did not except or object to them on the ground that they were not "considered and adopted by the Board as a board" (Pet. 14). No feature of the record other than the lack of a formal recitation is claimed to, or does, indicate that the Board's final decision and order were not made at a meeting of the Board.

However, if petitioner's assumption were indulged that the Board had held no meeting, the short answer to the contention is that there is no provision of the Act and no rule of law requiring that the Board's orders and decisions be made at meetings.[19] The Act provides merely that if, upon the record, "the Board shall be of the opinion" that unfair labor practices have been committed,

[19] The decisions of state courts cited by petitioner (Pet. 27) did not involve the Act or administrative or quasi-judicial agencies comparable to the Board. Instead, they involved ordinances or statutes relating to municipal, town, or county board, such as school boards, of an executive or legislative, as distinct from a quasi-judicial, character.

"then the Board shall state its findings of fact and shall issue * * * an order * * * ." Section 10 (c). To read into this language a requirement that the Board adopt its orders only after it had formally declared itself to be in a "meeting" would be to impose, without any occasion, a formal procedure which Congress did not intend and which is not prescribed for courts or for quasi-judicial agencies comparable to the Board. Cf. *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 369.[20]

4. *The Claim of Bias and Prejudgment.*—Petitioner contends (Pet. 28–29) that the Circuit Court of Appeals should have set aside the Board's order for the reason that the Board was biased against petitioner, prejudged the issues, and failed to reconsider the case as required by the remand. Unsupported claims of this character scarcely would be tolerated if made against a court. Cf. *Ex parte American Steel Barrel Co.,* 230 U. S. 35, 43–44; *The Press Co.* v. *National Labor Relations Board,* decided December 9, 1940 (App. D. C.); *Henry* v. *Speer,* 201 Fed. 869 (C. C. A. 5th). The press releases and public statements cited by petitioner show nothing to support its drastic charges (R. VI, 570, 587, 592). That the

[20] While the orders of some federal agencies are recited to have been made at meetings, this is not true of the orders of courts or of other agencies, including the Board of Tax Appeals, the Federal Power Commission, and the National Mediation Board.

Board carefully and impartially reconsidered the case following the remand is affirmatively evidenced by the substantial differences between its final and its original findings and order. In contrast with its original findings, the Board found in its final decision, *inter alia,* that the evidence did not support the allegations that petitioner dominated and interfered with the Ford Brotherhood of America, Inc., in violation of Section 8 (2) of the Act (R. V, 324), and discharged Sable, Dovey, Schipper, Barron, and Winsiewski in violation of Section 8 (3) of the Act (R. V, 345; compare R. III, 2129–2133, 2143–2144, 2145–2146, 2148).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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